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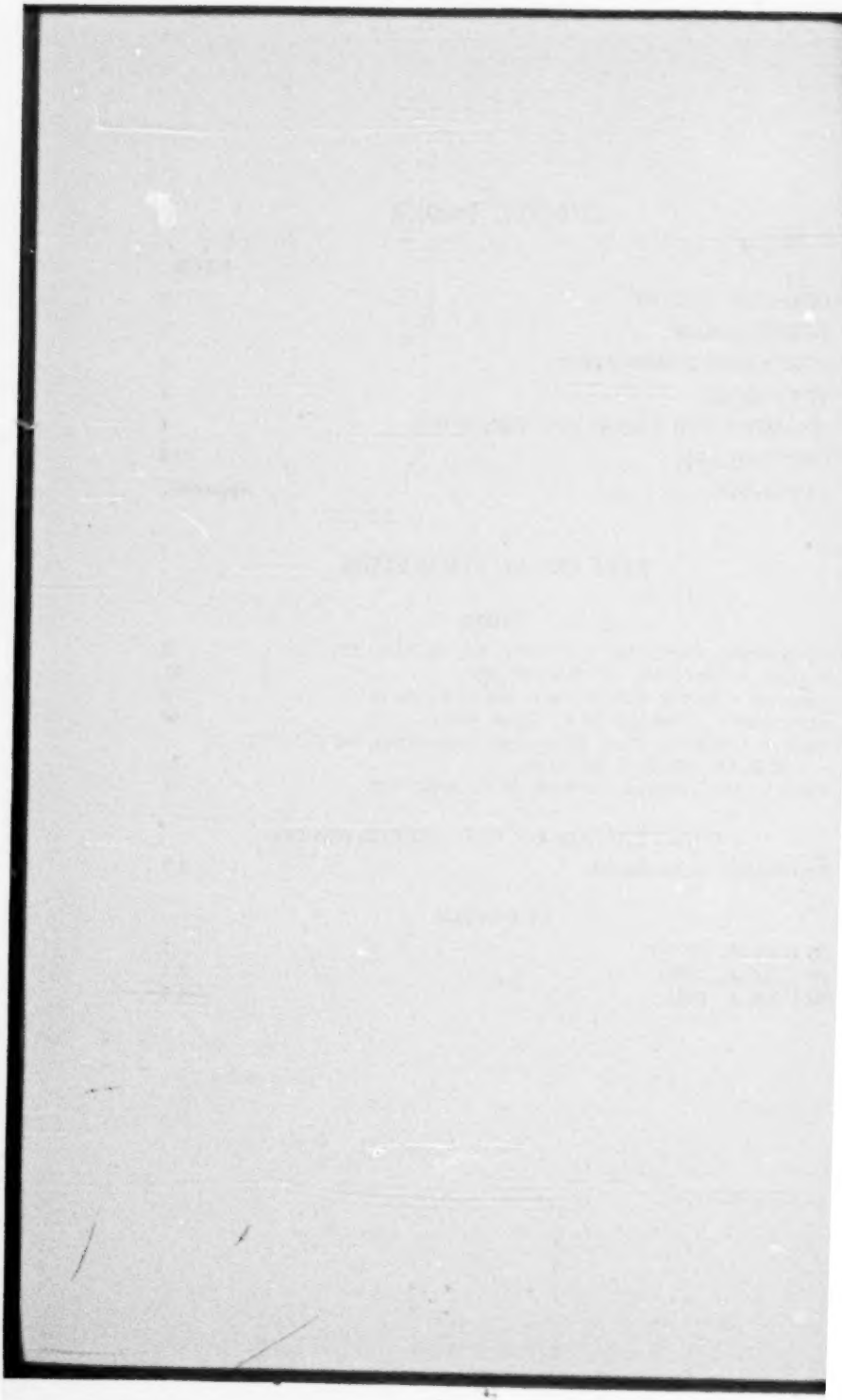

IN THE

Supreme Court of the United States

No._____

Bob Casey, The Duly and Legally Elected, Qualified and Acting County Judge of Harris County, Texas, Phillip E. Sayers, V. V. Ramsey, W. Kyle Chapman and E. A. Lyons, as Members of the County Commissioners Court of Houston, Texas, W. F. (Dee) Derrington and Harris County, Texas, A Body Corporate, Appellants,

v.

M. W. Plummer, George Nelson, James L. Roberts and Mrs. Lillie M. Alonzo, et vir, Appellees

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Petitioners W. F. (Dee) Derrington and Harris County, a Body Politic, pray that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered December 19, 1956, said opinion and judgment affirming the judgment of the District Court of the United States for the Southern District of Texas in favor of M. W. Plummer, George Nelson, James L. Roberts, and Mrs. Lillie M. Alonzo and husband, C. E. Alonzo, plaintiffs in the trial court.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit No. 16151 is attached to the appendix.

Jurisdiction

The Judgment of the Court of Appeals was entered December 19, 1956. The jurisdiction of this Court is invoked under 28 USCA 1254(1).

This is a case involving the Fourteenth Amendment to the United States Constitution, Section 1, which states:

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes involved in this case are as follows:

28 USCA 1343. Civil rights

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 47 of Title 8 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. June 25, 1948, c. 646, 62 Stat. 932.

42 USCA 1983 (formerly 8 USCA 43). Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Questions Presented

(1) Whether the trial court had jurisdiction over the petitioner Derrington to issue its writ of injunction, when by stipulation and proof adduced, the allegations of the complaint, by which the jurisdiction of the Court was originally invoked, were expressly negatived, to-wit, that Derrington was the agent, servant and employee of petitioner Harris County.

(2) Whether the trial court has jurisdiction to compel a State instrumentality by injunction to take overt positive action under the Fourteenth Amendment to prevent private acts of discrimination committed by the lessee of such instrumentality in the conduct of his private business.

Statement

This is an action brought by four negro citizens of Harris County, Texas, against the Harris County Commissioners' Court and against W. F. Derrington, seeking a declaratory judgment of their rights and for an injunction against Harris County and Derrington restraining them from maintaining an alleged policy, custom and usage of denying to plaintiffs and for those whom they sue, on the ground of race and color, the use and equal enjoyment of a cafeteria situated in the Courthouse of Harris County, in the City of Houston, Texas. Plaintiffs invoked the jurisdiction of the Court for their suit in three instances:

(1) As being a suit in equity arising under the 14th Amendment of the Constitution and Sections 41 and 43 of Title 8, United States Code, for which jurisdiction is afforded by the terms of 28 USCA 1331,

(2) As being a suit in equity authorized by law to redress the deprivation under color of law, statute, ordinance, regulation, custom and usage of a State, the rights, privileges and immunities secured by the 14th Amendment to the Constitution and by Sections 41 and 43 of 8 USC, for which jurisdiction is afforded by the terms of 28 USCA 1343, and

(3) As being a proceeding for a declaratory judgment and injunction brought under 28 USCA 2201 for the purpose of determining a question in actual controversy between the parties, to-wit, whether or not the

alleged custom, policy and usage, of the defendants acting together, is in violation of the 'equal protection' clause of the 14th Amendment to the Constitution.

Motions challenging the jurisdiction of the Court were filed by both Harris County (Tr. 38) and by Derrington (Tr. 62), which motions were carried by the Court along with the cause (Tr. 132), and impliedly were overruled by the Court's findings of fact and conclusions of law (Tr. 134).

The facts, as they appear by stipulation (Tr. 68-73) and from the Trial Court's findings of fact, are that Harris County, after complying with all provisions of law applicable thereto, did on May 21, 1953, accept the bid of and lease to appellant Derrington space in the Courthouse for a term from June 10, 1953, through December 31, 1954, and thereafter, acting under the option provisions of the lease, in an instrument using identical language did renew and extend the lease from January 1, 1955, through December 31, 1956. During the original and extended and renewed periods, for which the cafeteria was and is leased, Derrington has been the sole and exclusive lessee of the cafeteria, and has operated the same as a restaurant where meals and soft drinks are served to the general public and to the approximately 1,000 employees of Harris County. The renewal and extension lease was executed after this civil action had been instituted, with knowledge on the part of both Harris County and Derrington that the suit raised issues of alleged violation of plaintiffs' civil rights by reason of the denial to them of the use and benefit of the cafeteria. During the original period of the lease, on August 27, 1953, the negro plaintiffs, appellees here, presented themselves for service to Derrington, who then had the cafeteria under his

sole direction, supervision, sanction, instruction and control, and Derrington informed them that the cafeteria did not and would not serve colored people. It is stipulated (Tr. 73) that in all likelihood should appellees again present themselves for service, Derrington would assert the right to refuse to serve them for any reason that he saw fit and would probably refuse them service for the reason that they were members of the negro race. The stipulation was clear, and the trial court found (Tr. 141), that the lease was an arms' length bona fide transaction between Harris County as lessor and Derrington as lessee for an adequate and substantial remuneration to the County, and that the lease was not a stratagem or even a "negotiated" lease, but was a lease to the highest bidder after public offers and bids for the lease had been received.

The trial court entered its Judgment (Tr. 144) adjudging that Harris County might not constitutionally deny the plaintiffs and other members of the negro race the right to patronize the Courthouse Cafeteria and ordered that Harris County be enjoined from renewing or extending the present lease or from executing any new leases, or otherwise divesting itself of management and control of the premises without specific assurances that facilities would be made available for the use of colored persons and circumstances and conditions substantially equal to those afforded members of the white race. Derrington is enjoined from excluding members of the colored race from patronage in the Cafeteria solely by reason of their race or color.

The United States Court of Appeals agreed with the trial court's finding that the original lease agreement was in all respects a bona fide and arms' length transaction and was

entered into in compliance with all requirements of law, and found that the acts of racial discrimination complained of were those of Derrington, the lessee, and stated the question before it to be whether the action of the lessee, Derrington, is merely private conduct or may fairly be said to be the conduct of the County, and thus State action, within the inhibition of the Fourteenth Amendment. The Court of Appeals held that as Derrington stands in the place of the County, therefore Derrington's conduct is State action.

Reasons For Granting The Writ

It is respectfully submitted that the Court of Appeals has rendered a decision in conflict with other decisions of other courts on the same matter, and has decided an important question of Federal law that should be settled by this Court, and has decided such Federal question in a way probably in conflict with applicable decisions of this Court regarding the same subject matter, and in its decision has so far departed from the accepted and usual course of judicial proceeding by sanctioning such departure by the trial court, as to call for an exercise of this Court's power of supervision, and a statement of the extent of the application of the law.

In the original instance plaintiffs invoked the jurisdiction of the trial court under the provisions of 28 USCA 1343 and 42 USCA 1983, by the inclusion of the allegation in their complaint that Derrington and Harris County deprived plaintiffs of a right and privilege secured by the Fourteenth Amendment to the Constitution, to-wit, the equal protection of the laws, in denying them the right to eat in the Cafeteria. In the complaint it is repeatedly alleged that Derrington was the agent, servant and employee of Harris

County, acting under the authority, control, sanction and direction of the Commissioners' Court in doing the acts complained of, and that Harris County, through its agent, servant and lessee, denied to plaintiffs the right to use the Cafeteria, that the lessee's servants, agents and employees of Harris County were acting under the direction, control, supervision, authority, instruction and sanction of Harris County, that the administrative officers of Harris County were maintaining, operating, supervising and controlling the Cafeteria, and, in general, alleges directly and indirectly that it is the policy, custom and usage of Harris County and Derrington to deny to negroes the right to the free and unrestricted use of the Cafeteria on account of the race and color.

Without the extravagant allegations summarized above, no case or justiciable controversy would be presented as to confer jurisdiction. A suit against Derrington alone alleging that he did the acts of which plaintiffs complain, would not be determinable by the United States District Court for lack of jurisdiction, as no State action would be shown. A suit against Harris County without including Derrington would likewise not be justiciable, because of the obvious defense of the County that Derrington was a lessee and not under the control of the County and that the acts complained of were the acts of Derrington. Therefore, it was necessary for the plaintiffs in this case to include both defendants and to, in effect, allege a conspiracy and consort of action as to create an apparent agency on the part of Derrington, therefore rendering Harris County responsible at law for his acts.

But after the stipulations in this case had been filed and the evidence adduced, the jurisdictional facts upon which

plaintiffs base their actions evaporated, when it was asserted, admitted by stipulation, and found by the Court, that Derrington was not the agent, servant, employee or representative of the County, nor was he acting under the authority, control, sanction and direction of the County Commissioners' Court, in doing the acts of which plaintiffs complain.

Similar contentions to those raised by plaintiffs in this case were urged in the case of *Johnson v. Levitt & Sons, Inc.*, 133 F. Supp. 114, where a negro plaintiff sued the developer of a subdivision and also the Federal Housing Administration and Veterans Administration, to enjoin discrimination against negroes. It appeared that the governmental defendants were involved because those agencies were instrumental in the developer's securing the necessary financing of homes by their guarantee of mortgages. It was conceded that the Governmental defendants had not in fact attempted to exercise any control over the developer's sales policy, but had the power to put an end to the policy of discrimination by refusing to guarantee mortgages. The plaintiff contended that the regulation, control and exercise by the Federal agencies in the subdivision was so extensive, the relationship between the Federal agencies and the developer so intimate, the Federal aid given so crucial to the development of the subdivision that the actions of the developer must be deemed the acts of the Federal agencies. The Court in striking down such contention, held that the functions of the agencies did not make the developer the Government of the United States, or a branch of the Government of the United States, or an agency of the United States, nor could such functions make the Government of the United States a builder or developer of the subdivision. Relief was denied. In the instant case the plaintiffs assumed that the County could do

something about discrimination and contend that because the County has failed to do anything about it and by reason of the fact that the operation of the Cafeteria is closely adjacent in point of physical location to the operation of County offices and instrumentalities, the County's failure to correct Derrington's acts as a private individual, involved the County in the operation of the Cafeteria so as to make the acts of Derrington the County's acts.

The Court of Appeals has not recognized the dual capacities in which municipal corporations, such as Harris County, may operate. The primary function is the exercise of political or governmental powers being the furtherance of the general welfare, health, morals and safety. Without doubt these are non-delegable functions and may not be conveyed away to private parties, because they must be exercised by public officials who are responsible to the people for their uniform enforcement and general operation. Contrasted are the quasi-private or quasi-corporate functions of municipal corporations which may be delegated, sold and transferred as to create in private parties private rights. The operation of a cafeteria is not a governmental function. The lease to a private individual of a small unused space in the basement of the Courthouse for a substantial remuneration is certainly within the quasi-corporate functions of the County. The operation of a private business by a private individual in space leased by the County to him does not place him in the position of the County with respect to his patrons.

The Court of Appeals in its opinion relies on cases, each of which is concerned with governmental functions of a municipal corporation. *Lawrence v. Hancock*, 76 F. Supp. 1004, *Muir v. Louisville Park Theatrical Association*, 347

U.S. 971, 74 S. Ct. 783, 98 L. Ed. 1112, and *Tate v. Department of Conservation & Development*, 231 F. 2d 615, affirming 133 F. Supp. 53, was each concerned with the operation of public parks and places of public amusement and recreation. *Nash v. Air Terminal Service*, 85 F. Supp. 545, is concerned with public transportation in an airport operated under the supervision of the Federal government and closely bound up with Interstate Commerce. The Court of Appeals has revised the judgment of the true governing body of Harris County in holding that the basement of the Courthouse cannot be surplus property that the County may lawfully lease; it was expressly held to the contrary by the Texas Supreme Court in *Dodson v. Marshall*, 118 S.W. 2d 621, that the County Commissioners Court is empowered to lease unused space in the Courthouse to a private individual for the conduct of a private business. The Court of Appeals, once arriving at this decision, has little difficulty in holding further that Derrington is the manager of the cafeteria for the County and, thus, his acts are State acts.

A substantial Federal question is presented by the trial court assuming jurisdiction to compel a State agency to take overt positive action under the Fourteenth Amendment to the Constitution to eliminate private acts of discrimination on the part of its citizens. Specifically, it should be noted that plaintiffs complain not of the action of Harris County, but in its failure to take action. Because of the position of plaintiffs and the true facts in the case, the judgment of the Court is not to restrain illegal action, but to compel action which the Court believes morally fit and proper, without regard as to whether the same be within the contemplation of the law or not. The language of the Constitution is conclusive that there

was a separation of powers, Federal and State, that the powers delegated to the Federal Government were few and defined, and that those which were to remain in the State Government are numerous and indefinite. Countless decisions since the adoption of the Constitution support that view. In race questions, the courts were first concerned with investing the negroes, formerly slaves without any rights, with the rights attendant on their status as citizens. Many things we enjoy in this country are rights,—the law gives them to us and no one may deprive us of them without proper cause. Other things we enjoy are privileges: Privileges may be extended to us or withdrawn from us on such proper standards by governmental agencies as would seem consistent with our own merit and the general welfare of society. Some privileges we enjoy are not the concern of governmental agencies, but nevertheless arise through our relationship with society in general. Such social privileges as we enjoy are those which we gain for ourselves, and follow such social recognition, acknowledgment and respect as we enjoy from other members of our society. The Court cannot overlook the fact that in the South at present it is not socially customary for the races to mingle under all circumstances, and, in particular, it is not socially customary that the races mingle in restaurants and cafes. No man has the right to socially mingle with any other man, but all have the privilege to mingle if each is agreeable to it. To give one man the right to mingle with another against the will of the latter, is to deprive the latter of his right to refuse to mingle. Protection of a minority, if carried to extremes, must result in a tyranny of the minority.

This supreme tribunal has recognized the problem of balancing civil rights on the one hand as against enforced

social acceptance on the other. In the Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835, this Court pronounced that:

> "When a man has emerged from slavery and, by the aid of beneficient legislation, has shaken off the insufferable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rights of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen and a man are to be protected in the ordinary modes by which other men's rights are protected under the law."

No matter how desirable the integration of social practice with political idealism might be, such integration can never succeed until it has first found acceptance in the minds, consciences and attitude of the individual people it involves. The law cannot justly coerce or by mandate create a desired attitude or response among the members of society, though it may regulate such attitudes and responses when the same have been crystallized. Moral conviction and the acceptance of sociological changes by the people themselves are necessary before the law can be said to be the will of the governed.

If the decision of the lower courts is permitted to stand, it will support the proposition that the Federal Judiciary may require each State to compel every fraternal, church, social club and business corporation created by such State or operating under its laws to take overt and positive action to insure that no racial discrimination be made between its members and other citizens. This under the theory that the State having acted to create these corporations and permit their operation, is so involved with the delibera-

tions and functions 'in origin and purpose' that the State is responsible in law for acts of corporate discrimination, no matter how remote such acts might be from true State acts. Thus, it would be said that should a retail corporate merchant, catering to its conception of the desires of its clientele, discriminate racially in its sales, the failure of the State to have taken some precaution or to make available some remedy would form the basis for a Federal injunction against such discrimination.

It is accordingly urged that a Writ of Certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

JOE RESWEBER, *County Attorney*
G. D. MINICK, *Asst. County Atty.*
Harris County Courthouse
Houston 2, Texas

SAM R. MERRILL
Bankers Mortgage Building
Houston 2, Texas

Attorney for Appellant
W. F. (Dee) Derrington

Certificate

I hereby certify that a true copy of the above and foregoing Petition for Writ of Certiorari was served upon Respondents by delivering a true copy thereof to Hon. Henry E. Doyle, attorney for such Respondents, this 7th day of February, 1957.

Sam R. Merrill
~~Wm. H. Scott, Jr.~~

APPENDIX

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 16151

W. F. (DEE) DERRINGTON and HARRIS COUNTY, TEXAS, acting herein by its County Judge and Commissioners,
Appellants,

versus

M. W. PLUMMER, ET AL.,
Appellees

Appeal from the United States District Court for the Southern District of Texas

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(December 19, 1956)

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

RIVES, Circuit Judge: The district court, upon a thoughtfully considered memorandum opinion,[1] permanently enjoined Harris County, Texas,

> "from renewing or extending the present lease, or from executing a new lease, or otherwise di-

[1] Reported at 1 Race Relations Law Reporter 532.

> vesting itself of management and control of the premises comprising the Courthouse cafeteria without specific assurances that facilities will be made available for the use of colored persons under circumstances and conditions substantially equal to those afforded members of the white race,"

and further enjoined the lessee Derrington,

> "after ninety (90) days from December 29, 1955, from excluding members of the colored race from patronage in the said cafeteria solely by reason of their race or color under the circumstances here prevailing."

From that decree both Harris County and its lessee Derrington appeal.

The facts are mostly stipulated and entirely undisputed. A new courthouse for Harris County was completed in the summer of 1953. A part of the basement was planned for operation as a restaurant or cafeteria and was furnished and equipped by the County for such purpose. As the building neared completion, the County advertised for bids for the lease of such space. Derrington was the successful bidder.

The County leased to Derrington for a term beginning June 10, 1953 and ending December 31, 1954,[2]

> "* * * all of that certain space in the basement of the Harris County Court House in Houston, Harris County, Texas, known as the cafeteria space and being the room which is appropriately furnished and equipped for the operation of a

[2] Subsequently renewed from January 1, 1955 through December 31, 1956, as hereafter detailed.

> cafeteria, together with the small rooms adjoining it which were built to be used in conjunction therewith."

The rental was admittedly adequate, 20% of the gross sales of the cafeteria or not less than $750.00 per month. The County agreed to provide water service, lighting, heating and air conditioning of the premises, and such water and electricity as is reasonably necessary to the conduct of the cafeteria business by Derrington. On his part, Derrington agreed to "operate a first class cafeteria", to "keep this cafeteria open at all such times as the Court House is open," to "abide by all Federal or State regulations as to policy, limitations on meals, food stuffs, drinks, etc., sold in this restaurant," and *not* to

> "permit in the demised premises any disorderly conduct or any conduct or practice in violation of any ordinance of the City of Houston or of any State or Federal Law, or of a sort likely to bring discredit upon Harris County or its Court House."

Employees of Harris County were to be given a 10% reduction in the price of foods and drinks "through the use of coupons or meal tickets or other means as may be determined by the Commissioners Court of Harris County."

The district court found and we agree that the original lease agreement "was in all respects a bona fide and arms length transaction, and entered into in compliance with all requirements of law."

On the trial, the County's attorney stated,

> "* * * that under Paragraph XIV of the lease as stipulated, that there is a renewal and optional agreement in there that would enable this man

> on five days' notice to renew and extend this particular lease."

It was in fact stipulated that before the execution of the renewal lease covering the term from January 1, 1955 through December 31, 1956.

> "* the said * * Derrington had * timely and in the manner provided in said lease given said County notice of his intention to exercise his option to continue and renew said lease upon the same terms and provisions contained in the original lease."

The same paragraph XIV is contained in the second lease.[3]

There are numerous cafes and eating places for white people and for negroes within a five block radius of the courthouse.

During the original period of the lease, appellees undertook to purchase food in the cafeteria and Derrington refused them permission solely because they were negroes. This class suit followed. Subsequently, the renewal lease was executed with knowledge on the part of both the

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[3] Paragraph XIV, as contained in each lease, reads as follows:

> "Lessee shall have the option of leasing and operating any other restaurant or cafeteria which the Lessor may elect to establish in the Harris County Court House, the Civil Courts Building, or any other building owned by Harris County lying within a one block area of said Court House upon the same terms and conditions as set out in this instrument. After notice of intention to operate such a unit is given by Lessor to Lessee, Lessee shall have five (5) days within which to exercise such option. Thereafter Lessor may contract with any other person, corporation or firm concerning such unit."

Absent the stipulation, it is not clear to us that this is an option to renew the lease.

County and Derrington that the suit raised issues of alleged violation of appellees' civil rights by reason of the denial to them of the use and benefit of the cafeteria. It was further stipulated that if the appellees or any other negroes were again to present themselves for service at the cafeteria,

> "Derrington would contend it to be his right to refuse to serve plaintiffs and such members of the Negro race in a like manner for any reason, and would probably refuse to serve members of the Negro or colored race for the sole reason that they were members of the Negro or colored race."

The acts of racial discrimination, both those committed and those immediately in prospect, are the acts of Derrington, the lessee. Derrington's second lease expiring December 31, 1956, before our mandate can become effective, it might be, though it is not, contended that the case would thereby become moot. If Derrington does not have an option to renew his lease (see footnote 3, *supra*), it may be renewed by mutual agreement, or the County may lease to another who will practice like discrimination. Even if there had been a voluntary cessation of the alleged illegal conduct, the public interest in having the legality of the practice settled militates against a mootness conclusion in the absence of an affirmative showing that there is no reasonable expectation that the alleged wrong will be repeated. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632, 633. See also *United States v. Freight Ass'n*, 166 U.S. 290; *United States v. U. S. Steel Corp.*, 251 U.S. 417; *Trade Comm'n v. Goodyear Co.*, 304 U.S. 257; *Walling v. Helmerich & Payne*, 323 U.S. 37; *United States v. Oregon Med. Soc.*, 343 U.S. 326.

On the merits the decisive question is whether the action of the lessee, Derrington, is merely private conduct or may fairly be said to be conduct of the County and thus State action within the inhibition of the Fourteenth Amendment. The Civil Rights Cases, 109 U.S. 3; *Shelley v. Kraemer*, 334 U.S. 1.

No doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person. Those principles do not, however, control the decision of this case for several reasons.

Assuming no purpose of discrimination on the part of the County in the renewal of the lease, and further assuming no express reservation of control by the terms of the lease to prevent discrimination, neither of which assumptions is beyond question, and pretermitting the legal effect of the County's furnishing water, electricity, heating and air conditioning services to its lessee, the basement of the courthouse can by no means be termed surplus property not used nor needed for County purposes. To the contrary, the courthouse had just been completed, built with public funds for the use of the citizens generally, and this part of the basement had been planned, equipped and furnished by the County for use as a cafeteria. Without more justification than is shown in this case, no court could countenance the diversion of such property to a purely private use.

Further, the express purpose of the lease was to furnish cafeteria service for the benefit of persons having occasion to be in the County Courthouse. If the County had rendered such a service directly, it could not be argued that discrimination on account of race would not be violative of the Fourteenth Amendment. The same result inevitably follows when the service is rendered through the instrumentality of a lessee; and in rendering such service the lessee stands in the place of the County. His conduct is as much state action as would be the conduct of the County itself. *Muir v. Louisville Park Theatrical Association*, 347 U.S. 971, reversing 6th Cir., 202 F. 2d 275, which had affirmed W.D.Ky., 102 F. Supp. 525; *Department of Conservation & Development v. Tate*, 4th Cir., 231 F. 2d 615, affirming E.D. Va., 133 F. Supp. 53; *Lawrence v. Hancock*, S.D. Va., 76 F. Supp. 1004; compare *Nash v. Air Terminal Services*, E.D. Va., 85 F. Supp. 545; see also *City of St. Petersburg, etc. v. Alsup*, 5th Cir., No. 16,100, m/s.

The judgment is therefore

AFFIRMED.

A True Copy:
Teste:

JOHN A. FEEHAN, JR., Clerk

By CLARA R. JAMES, Deputy
Clerk of the United States Court of
Appeals for the Fifth Circuit.